

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1430

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA

Docket No. 77-1430

- v -

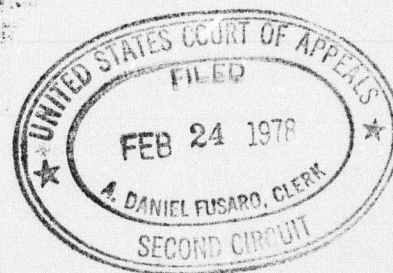
JAMES BENNETT,

Defendant-Appellant.

B
p/s

REPLY BRIEF OF APPELLANT
JAMES BENNETT

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- v -

JAMES BENNETT,

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REPLY BRIEF OF APPELLANT
JAMES BENNETT

This Brief is submitted by the appellant, James Bennett, in reply to the answering memorandum of the Government.

It was entirely inappropriate and unfair for the Government in its Brief (footnote 2, at page 4) to refer to an offer of proof on their part, which offer had been rejected by the Trial Court. Inasmuch as the sufficiency of the evidence is the sole issue for this Court to decide, it was entirely misleading and improper for the Government to set forth proposed testimony, which testimony had been rejected by the Trial Court. FBI Agent Robert Lee had testified in a voir dire hearing, outside the presence of the jury, as to a proposed offer of proof which the Government wished the jury to hear (R. 124-128). The United States Attorney quotes from and summarizes that voir dire testimony in footnote 2 of its Brief. The Trial Court had rejected that offer of proof,

so that the jury never did hear what the Government sets forth in footnote 2. The Government erroneously states in footnote two that the Trial Court "redacted" Agent Lee's testimony. Again that is misleading - as the jury never did hear the offer of proof, there was nothing to redact. In doing so, the District Judge stated (R. 136, 140, 141):

"He's been tried and acquitted on that."

I think what my ruling will be is that I will permit Mr. Lee to testify up to, but not including the statements, that this man is the one who hijacked the plane and held up the bank. I would exclude that portion of the conversation on the ground that it is highly prejudicial, certainly tends to generate issues which have not been raised in this case at this point, and is of little probative weight in terms of shedding light upon the intent of the defendant as of January 25, 1977.

According to the notes that I took down, you got to the point where he said, 'I know the law' and you had a 45 minute conversation and he was aware of the President's schedule. I think at this point insofar as the direct case is concerned, I will limit the proof to that."

For purposes of weighing the sufficiency of the evidence, what is significant is what Agent Lee testified to in the presence of the jury (R. 143 - 144, 145 - 147), and not his proposed testimony outside the presence of the jury, which was rejected by the Trial Court. In its answering briefs, and in oral argument, the Government should be foreclosed from referring to matters which are outside the trial record.

As Bennett did not testify, or offer reputation witnesses, the trial record is silent as to aspects of his life apart from the incident in question. The appellate presentation should be limited as such.

In its Brief (page 7) the Government seeks to avoid the issue of the sufficiency of the evidence by arguing that since twelve jurors, properly instructed, interpreted Bennett's remarks as a threat, it was not for this Court to review it or to disturb it. However, the issue of sufficiency of evidence is a legal issue, not a factual one, and is always a task for the District Court initially, and eventually for the Court of Appeals upon review. It does not suffice that the jury has convicted. What is critical is whether the District Judge should have submitted the case to the jury for its consideration. The guiding principals within this Circuit are to be found in Judge Friendly's opinion in United States vs. Taylor, 464 F. 2d 240, 242 - 245 (CA.-2, 1972), in which this Court stated:

"It is of course a fundamental of the jury trial guaranteed by the Constitution that the jury act, not at large, but under the supervision of a judge.

Before submitting the case to the jury, the Judge must determine whether the proponent had adduced evidence sufficient to warrant a verdict in his favor.

Almost all the circuits have adopted something like Judge Prettyman's formulation in Curley vs. United States, 160 F. 2d 229, 232 - 233 This, along with its rationale reads as follows:

'The functions of the jury include the determination and the credibility of the witnesses, the weighing of the evidence, and drawing of the justifiable inferences of fact or proven facts. It is the function of the Judge to deny the jury any opportunity to operate beyond its province.

The critical point in this boundary is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jury men must necessarily have such a doubt, the Judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration.

The true rule therefore is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, given full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If it concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion' "

Obviously, in considering a motion for judgment of acquittal, the District Court in this instance must be concerned with issues which are of absolutely no concern to the jury. The District Court should have addressed itself to the problem proposed by the First Amendment, and its protection of free speech. The District Court should concern itself with the statutory meaning of the term "threat", and whether the literal, naked meaning can prevail. The intent of Congress must include legislative respect for the First Amendment, and a desire not to stifle or chill constitutionally protected free speech and expressions of political discontent or criticism. In this regard the District Court would have

done well to consider two landmark cases from the High Court. In the celebrated case of Rector of Holy Trinity Church vs. United States, 143 U. S. 457 (1892) the Supreme Court held that if a literal construction of the words of the statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that result. The High Court wrote (143 U. S. at 461):

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequence. It will always, therefore be presumed that the legislator intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The principals enunciated in the Holy Trinity Church case have continued to enjoy respect and vitality in the jurisprudence of the Supreme Court. In United States v. American Trucking Association, 310 U. S. 534, 543 (1940), the High Court wrote:

"There is of course no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has lead to absurd and futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words."

The Government does not dispute that Watts (394 U. S. 705) is good law. Since it is an opinion of the High Court itself, the Government is foreclosed from complaining about its wisdom or application. As such, the Government would just like this Court to believe that Bennett's case is totally dissimilar from Watts.

The defense in this case does not dispute that Compton (428 F. 2d 18) is good law, and was properly decided. We are merely asking this Court to find that Bennett's case is factually very different from Compton, and very close to Watts.

In Watts, in the context of a political discussion, the defendant stated - "If they ever make me carry a rifle, the first man I want to get in my sights is LBJ." 394 U. S. at 706. The Supreme Court did not find there to be a violation of the criminal statute, for the words uttered were done within the context of a political discussion, and thus protected by the First Amendment.

Likewise in Bennett, the testimony showed that there was a forty-five minute discussion between James Bennett and the two agents with regard to many political and public issues. Bennett voiced his opinion with regard to the issue of amnesty for draft dodgers, the Protestant-Catholic conflict in Northern Ireland, the quality of Government medical service for returning veterans, his own family problems,

and finally his own medical problems with regard to a wounded arm. As such, Bennett's single statement, made at the conclusion of a forty-five minute discussion involving political and public and personal issues, must be considered within that context as being a statement of personal opinion and personal grievance, within the protected area of free speech. It is within the constitutional area of one seeking redress for a political grievance suffered at the hands of the Federal Government.

In Compton (428 F. 2d 18), there was no discussion involving any political or public issues. At the spur of the moment, Compton telephoned the New York City Police Department, and announced that he was going to assassinate the President. There was no prior discussion of any public or political issue that was worthy of First Amendment protection. It was merely a flat statement made out of the blue, without context - without significance - without any consideration of public policy that would require constitutional protection.

CONCLUSION

The First Amendment recognizes that we are a diverse group of people, whose political expressions are as numerous and different in tone and in style as the number of persons in the nation. The First Amendment mandates that we respect the differences as healthy for a free, open society, even though the particular statement under scrutiny may be disagreeable or even offensive. Bennett's political expressions may lack the finesse and style of a Hubert Humphrey. Nevertheless, the federal courts are duty bound to protect Bennett in his political and public expressions. The Congress was equally cognizant of the protection of free speech when it enacted the statute in question in this case. As such, the statute has built - in limitations, and it is encumbered upon this court to see that these limitations are not eroded.

Dated: New York, New York
February , 1978

Respectfully submitted,

H. ELLIOT WALES
Counsel for Appellant, Bennett

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No. 77-1430

UNITED STATES OF AMERICA

Plaintiff

against

JAMES BENNETT

Defendant
Appellant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 26-80 - 30th Street, Astoria, New York

That on
Reply Brief

February 23

19 78 deponent served the annexed

on the United States Attorney for the Eastern District of New York
attorney(s) for plaintiff

in this action at 225 Cadman Plaza East, Brooklyn, New York
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this
23rd day of February, 1978.

Iola Krezia

IOLA KREZIA
The name signed must be printed beneath

H. Elliot Walls
H. ELLIOT WALLS
Notary Public, State of New York
No. 21-4129915
Qualified in Westchester County
Commission Expires March 30, 1979

